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No. 04-916

Supreme Court, U.S.
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# In The Supreme Court of the United States

HARTFORD STEAM BOILER
INSPECTION AND INSURANCE COMPANY,

*Petitioner,*

v.

UNDERWRITERS AT LLOYD'S AND
COMPANIES COLLECTIVE, *et al.*,

*Respondents.*

**On Petition For Writ Of Certiorari**
**To The Supreme Court Of Connecticut**

## REPLY BRIEF IN SUPPORT OF PETITIONER

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## REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

As petitioner Hartford Steam Boiler Inspection and Insurance Company ("HSB") has already shown in its Petition for Writ of Certiorari, the Connecticut Supreme Court's decision in this case has effectively created a new, unwritten addendum to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* sanctioning a remand to arbitrators for clarification that not only is absent from the statutory text, but that in fact is flatly inconsistent with the FAA's express terms. In so doing, the Connecticut court created a conflict between its decision and the decision of the United States Court of Appeals for the Ninth Circuit in *Western Employers Insurance Co. v. Jefferies & Co.*, 958 F.2d 258 (1992), and threatened the very predictability of result that commercial arbitration is intended to achieve. Accordingly, HSB has shown that this Court's intervention is needed, to give effect to unambiguous statutory language and to ensure that judicial review of arbitration awards proceeds under predictable and well-defined rules.

Respondents' Brief in Opposition does not undermine these showings. Even so, a brief reply is in order, to make clear (i) that this matter in fact does present a federal question within this Court's jurisdiction, and (ii) that this Court's review is needed to ensure that the FAA is interpreted in accordance with its express terms and consistently throughout the United States.[1]

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[1] Because of the constraints inherent in a reply, HSB's failure to take issue with each of the many misstatements of law in Respondents' Brief should not be construed as agreement with or acquiescence in those misstatements.

## I. The Decision Below Implicates a Federal Question Within This Court's Jurisdiction.

The bulk of Respondents' effort in their Brief in Opposition is directed to suggesting that this case does not present a federal question within this Court's jurisdiction. Respondents' argument, however, is belied by the very language of the Connecticut Supreme Court's opinion, as well as the statute that confers jurisdiction to review that decision (a statute Respondents expediently quote only in part).

This Court, of course, has jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State . . . where the validity of a . . . statute of the United States is drawn in question . . . or where any title, right, privilege or immunity is specially set up or claimed under the . . . statutes of . . . the United States." 28 U.S.C. § 1257(a).

The decision of the Connecticut Supreme Court plainly qualifies. Indeed, the court ***explicitly*** grounded its decision, and the availability of remand, on the FAA and principles of federal law:

> In the present case . . . , we believe that ***the trial court had the authority to remand the case pursuant to the arbitration act and federal precedent,*** without offending principles of functus officio.

Appendix ("App.") 20 (emphasis added).[2] *See also* App. 11 ("Thus, we determine that the arbitration act applies to

[2] Earlier in its opinion, the court defined the term "arbitration act" to refer to the FAA. *See* App. 7 ("Federal Arbitration Act (arbitration act), 9 U.S.C. § 1 et seq.").

the present matter. We now turn to an examination of relevant federal precedent."); App. 12 ("federal precedent also informs us that a court may remand without vacating a case to an arbitrator for clarification of a final award, pursuant to the arbitration act"); App. 13 ("'[M]any appellate courts have stated that an arbitration award under the [arbitration act] may be remanded for clarification if the award is ambiguous or incomplete' and it is clear that 'the functus officio doctrine does not preclude a motion for remand for clarification under the [arbitration act].'" (brackets in original; quoting *Lanier v. Old Republic Ins. Co.*, 936 F. Supp. 839, 845, 848 (M.D. Ala. 1996)).

The fact that the court did not ground the right to remand in any specific provision of the FAA – but rather apparently found the ability to remand for clarification in some accompanying principle of federal common law or some indistinct "penumbra" of the FAA – does not make its decision any less a matter of federal law.

Moreover, even if it could be said that the court's decision was exclusively a matter of common law, rather than statutory construction, there nonetheless is jurisdiction because HSB's right ***not*** to proceed on remand before the original arbitral panel is a "right, privilege, or immunity . . . specially set up or claimed under the . . . statutes of . . . the United States." 28 U.S.C. § 1257(a).[3] After all, HSB believes that the exclusive source of authority for dealing with errant arbitral awards is 9 U.S.C. § 10, which by its plain terms authorizes a remand ***only*** after an award is first vacated, and ***only*** when the time for rendering an award has not passed. *See* 9 U.S.C. § 10(b). Conversely,

[3] Respondents fail to quote this portion of the jurisdictional grant.

then, HSB believes that the Connecticut courts' adoption of an implicit power to remand for clarification contravenes HSB's right, as a matter of federal statutory law, to have the arbitral award dealt with in the matter provided in 9 U.S.C. § 10.[4]

Finally, the decision below effectively "draws into question" the "validity" of a federal statute, 28 U.S.C. § 1257(a), by causing a *de facto* judicial repeal of 9 U.S.C. § 10(b). After all, if courts are able to freely substitute a "simple remand for clarification" for Section 10(b)'s more limited remedy, Section 10(b) lacks any independent effect.[5]

In short, regardless of the common law origins of any right to remand, there is no question but that the decision of the Connnecticut Supreme Court implicates the FAA, and thus falls squarely within this Court's jurisdiction. Respondents' contrary contention – that a decision that expressly relies on a federal statute somehow fails to implicate a federal question – simply defies common sense.

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[4] As this Court has instructed, and HSB has previously argued, " 'where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.' " *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981) (quoting *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 19 (1979)). In such situations, we are "compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Id.* at 15.

[5] As HSB has argued, this Court's decisions make clear that courts must, wherever possible, construe statutes to "give every word some operative effect," and that courts conversely should not read a statute in a manner that would render part of it "entirely superfluous." *Cooper Indus., Inc. v. Aviall Services, Inc.*, ___ U.S. ___, 125 S. Ct. 577, 583-84 (2004).

## II. The Decision Below Squarely Conflicts With the Ninth Circuit's Decision in *Western Employers Insurance v. Jefferies & Co.*

Nor is there any substance to Respondents' efforts to distinguish this case from *Western Employers Ins. Co. v. Jefferies & Co.*, 958 F.2d 258 (9th Cir. 1992), a case which also involved an arbitral panel's failure to provide findings of fact and conclusions of law, but in which the Court was faithful to the statutory text and vacated the award.

Respondents' argument merely parrots the Connecticut Supreme Court's: both focus, unpersuasively, on the fact that the arbitrators in *Western Employers* affirmatively refused to provide findings and conclusions, while the actual motive of the arbitrators here remains unknown. *See* Respondents' Brief in Opposition at 15-16; App. 20-21 n.15. As HSB has already argued, that is a distinction without a difference, lacking any grounding in the language of the FAA or the core policies under girding the FAA.

Respondents also suggest that any conflict is negated by the Ninth Circuit's subsequent holding in *International Brotherhood of Teamsters, Local 631 v. Silver State Disposal Service, Inc.*, 109 F.3d 1409 (9th Cir. 1997), which permitted a remand as a matter of federal common law. Respondents fail to recognize, however, that the *Teamsters v. Silver State* case involved a labor arbitration, and not a commercial arbitration governed by the FAA. That distinction is critical: in the former case, this Court has invited courts to develop a body of federal common law, under the authority of Sections 203(d) and 301(a) of the Labor Management Relations Act, 29 U.S.C. §§ 173(d), 185(a), to govern labor arbitrations. *See generally Textile Workers of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957).

Indeed, this Court has emphasized that "arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). And indeed, labor contracts are expressly excluded from the FAA's coverage. *See* 9 U.S.C. § 1 ("nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"). *See generally* Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 832 (1996) (criticizing the unthinking transfer of concepts from labor arbitration under the LMRA to commercial arbitration under the FAA). In consequence, it cannot be said that the *Teamsters* case has any proper application in commercial arbitrations, such as those at issue here and in *Western Employers*.

Moreover, even if there were an intra-circuit conflict (which might not by itself justify this Court's review), that does not negate the existence of a simultaneous conflict between a state high court and a federal court of appeals (warranting this Court's resolution). As a result, even if there is a conflict between *Western Employers* and *Teamsters v. Silver State*, that does not negate the existence of a direct conflict between *Western Employers* and the decision below.

## III. Recapitulation.

In sum, nothing in Respondents' submission undermines the core considerations warranting this Court's review:

- **First,** that the Connecticut Supreme Court's decision contravenes the express language of 9 U.S.C. § 10(b), which permits remand only if an award is first vacated, and only if the time in which the arbitrators are to act has not expired;
- **Second,** that the Connecticut Supreme Court's ruling conflicts directly with the Ninth Circuit's decision in *Western Employers*, making manifest a conflict in principle that has lingered for years; and
- **Third,** that the Connecticut Supreme Court's ruling, by permitting *ad hoc* remands without regard to the statutory text, undermines parties' ability to define in advance the circumstances under which an arbitration will proceed, in a way that compromises the very certainty that is a key benefit of the commercial arbitration process.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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